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International Court of Justice

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CLOSING ARGUMENTS

FOR

M A R T I N B O R M A N N

BEFORE THE INTERNATIONAL MILITARY TRIBUNAL NUERNBERG

AT THE TRIAL

AGAINST HERMANN GOERING ET AL.

BY

DR. FRIEDRICH B E R G O L D

ATTORNEY-AT-LAW IN NUERNBERG

1946

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Your Lordship, Your Honors:

The case of the defendant MARTIN BORMANN with whose defense I have been commissioned by the Tribunal, is an unusual one. At the time when the National-Socialist Reich was still shining the defendant lived in the shadow, he kept on being a shadow at this trial and is, in all probability, today, too, among the shadows as the dead were called in ancient times. He is the only one of the defendants who is not present and against whom Article 12 of the Charter is applied. It seems as though history wanted to preserve the continuity of the genii loci and to see in the very town of Nuernberg a discussion of the problem of whether and in how far the greatest probability for a defendant's having lost his life will be an obstacle to a trial in absentia of such a man. For in Nuernberg an adage has come down from the Middle Ages to our times which says the Nuernberg people would not hang anybody lest he be apprehended first.

In other words, it was in Nuernberg in old times already where the question of whether a trial of an absentee can be carried out, was discussed in an excellent manner.

Article 12 of the Charter gives the Tribunal the right to carry out proceedings against a person indicted for one of the crimes mentioned in Article 6 of this Charter in his absence if the defendant cannot be found. According to Article 26 of the same Charter a decision is then final and cannot be appealed if the court exercises this, its right in such a case.

If Article 12 of the Charter gives the Tribunal the right to carry out proceedings in absentia, it must be concluded by reasons of logic and because of the absence of a corresponding stipulation in the Charter to the effect

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that it is the Tribunal's duty to exercise such a right, that the High Tribunal according to its dutiful discretion is permitted not to make use of this right given to it and decline to carry out proceedings in absentia. And it is evident that this may be done at any phase of the trial since the Charter does not make any stipulation concerning this point, and since this procedure is also permitted in the codes on legal procedure of the countries, for instance in Russian law.

I shall speak later of the fact that I think with certainty that the defendant BORMANN was killed on the night of 1 to 2 May 1945. Under the supposition that my assumption carries the greatest probability I must further examine whether it is legally possible and fair that the High Tribunal avails itself of the right provided by Article 12 of the Charter or whether it should not exercise it for reasons of justice.

I need not point out now that in the opinion of the defense counsels the Charter in general created entirely new law. This has already been stated by a number of learned friends who spoke before me and I can refer to their legal opinions which I dutifully make my own, too.

In examining the legal question as to what importance Article 12 of the Charter has within the law of civilized countries existing heretofore and what just and still valid legal maxims are to be used in its interpretation, one has to go into the legal history of proceedings in absentia.

To solve the task of how a country can and shall proceed against a defendant who cannot be found, has been attempted in many ways since ancient times already.

In older Roman law which has become an almost unrivalled example for most civilized countries of the world, the opinion was championed for a long time that criminal proceedings may not be carried out against an absentee because by them the first and holi principle of justice would be violated, namely that a defendant should be heard personally on the indictment. This doctrine culminated in the clear sentence: "Ne absentes damnentur". Later for political reasons -which shows how politics destroy the simple and clean principles of justice everywhere- some kind of proceedings in absentia were permitted in certain cases in which an absent violator of the law was outlawed by the aquae et ignis interdictio. In the case of capital punishment, however, the original legal maxi continued to be valid as before. Yet, even if the declaration of outlawry had been pronounced by a verdict, the possibility -and this is of great importance- was in every case granted again the returning "disobedient person" to prove his innocence. This seemed to this ancient people to be a foregone conclusion.

These two ways of dealing with criminal proceedings against defendants who cannot be found, go back, as we have seen, to the oldest time of the legal system. During the entire development of the legal system up to our days mankind has not found other solutions which differ essentially from these two ways.

Although it may not seem to have any connection with the case in question, I must of necessity show the further entire development of the law

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to prove in what form hitherto not known in all history of the law the Charter differs from these legal maxims existing throughout all times, in order to convince the Tribunal that my petition for suspension of proceedings (Aussetzungsantrag) which I shall make later, is justified.

In later Roman law -and that is how the further legal development begins- proscription was completely abandoned and the principle "ne absentes damnentur" prevailed without any restrictions. In genera Canonical law did not deviate from this legal principle.

In the Germanic laws of the migration of nations, however, proscription became again the prevailing procedure. But one must realize that in outlawing an absent defendant no punishment is meted out for the committed act, but only a punishment for the disobedience which by not appearing the defendant manifests towards the state and towards the court which embodies the state.

But upon the defendant's surrender to the court proscription always ended and the proper criminal proceedings began to take their course.

In all laws of the Middle Ages this legal procedure was further developed in the same way. The Bamberg Halsgerichtsordnung (criminal court ordinance) -one of the most important law creations of the Middle Ages- permitted this procedure for proscription only when someone was killed, But, as an innovation, it demanded that the act be proved. By this regulation

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the proceedings for disobedience alone were first abandoned in Germany. But despite all proof for the act, in Article 180 the law explicitly granted the condemned person on his later appearance in court the possibility of defending himself anew against the accusation. This legal principle was not changed either by Kaiser Karl V's Peinliche Halsgerichtsordnung (criminal court ordinance), because this law had made no rules - whatsoever as to the procedure against absentees, but had left them to the local laws of the smaller constituent states of the Reich.

Later in Bavaria the Codex Juris Bavarici of 1751 created a procedure against absentees in Chapter 10, Articles 21 and the following. This was the first law to allow real conviction for any offence which had been committed, and by so doing it departed entirely from the mere procedure of proscription. Even the execution of the verdict in effigie was permitted. However, this symbolical condemnation had a purely moral significance for thellaw explicitly stipulated that upon the absentee's return he was to be tried again, and in this way the defendant was guaranteed a hearing.

In Austria Maria Theresia had almost the same principles laid down in the Allgemeine Peinliche Gerichtsordnung (general criminal court ordinance) of 1771, and principal features of this also remainedin Joseph II's Kriminalgerichtsordnung (criminal court ordinance) of 1788.

The Prussian Kriminalordnung (criminal ordinance) of 1805 made a procedure in contumaciam possible for certain cases only, but as in all laws of that time, in Articles 577 - 587 it provides for new proceedings upon the absentee's surrender.

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I shall speak about the development of law in modern Germany later.

Theoretically English procedure contains still today so-called disobedience proceedings, proceedings for proscription, the process of outlawry, which is very similar to the old German procedure of proscription. But today this procedure no longer has any praatical importance and Stephan says in his "Commentaries to the Laws of England", 18th Edition, Vol. IV, page 324 that the last case of such a type took place in 1859 and that today such proceedings are so rare that they may be termed obsolete. Stephan deals with the process of outlawry only because theoretically it is still a part of criminal law and because the rules for it are set out in the Crown Office Rules of 1906. The rules of this process which in order to protect the absentee's rights, provides for a solemn announcement serving him with numerous summons to appear, before a hearing can be conducted at all, this procedure has no special importance here. It is significant, however, that upon the accused person's return the declaration of outlawry can be rescinded either by a plea of the accused or by a writ of error according to the circumstances of the case.

The laws of the United States of America adhere in general to this English law; but I have been informed that some statutes of important American states have completely abandoned the process of outlawry and only in case of indictment for treason declare a confiscation of property and outlawry as penalties.

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The French law regulates the procedure in absentia in the Code d'instruction criminelle of 17.2.1808, II. Book 4. Titel, Chapter II, Article 465, in the following way. It is used only in special cases of criminal prosecution, which provide for a repeated and solemn summons after which a sentence of contempt of court can be pronounced, declaring the consequences of the defendant's civil death.

But what seems to be important here, is that this procedure also provides for a retroactive annulment of the proceedings, if the convicted person appears voluntarily or is apprehended by the authorities.

The Russian civil law according to article 265 of the criminal code and to decision No.181 of the Presidium of the Highest Court, prescribes action against absentees only under quite definite conditions. Among these the most important are: One, that it must be proved and not only presumed that the defendant is evading justice deliberately, and two, that the procedure can be applied only in quite special cases where there can be no doubt as to the circumstances. Moreover, in order to safeguard justice it is prescribed that such procedure in absentia should be revised ex officio by a vocational court. Particularly in cases calling for the heaviest penalties the court should not as a rule permit the proceedings in absentia to be applied. I must admit that I consider this Russian regulation to be one of the happiest solutions which can be found, if a procedure in absentia is desirable at all.

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The remaining European countries either totally exclude proceedings in absentia or permit them likewise only under special provisions, but always ensuring a subsequent revision of the sentence, when the absentee is apprehended by the authorities, thus safeguarding the ancient principle of justice, that the defendant should be lawfully examined. This viewpoint is valid amongst other cases, for Austria, Czecho-Slovakia, Hungary, Spain and the Netherlands. Belgium and Greece have adopted the French rules.

Switzerland and Italy are exceptions. Most of the Swiss cantons, in whose power, according to Swiss conceptions, the penal authority lies in the first place, possess quite different rules of procedure in absentia under the safeguard of subsequent sentence revision, mostly corresponding to the former German civil codes. But the new law of the Union of 15 June 1936, on criminal penal authority, which replaces the former law of the Union Code of 1851, prescribing a new procedure in case of the absentee's capture, permits such a new proceddure only then , when it is later established, that the absentee has been innocently prevented from appearing. But, of course, the court has in addition the irrefutable right to adjourn the proceedings indefinitely when the presence of the defendant becomes absolutely necessary. Such a necessity will certainly always be the case, when the court is unable to obtain a clear view of the case. In this way even by such extensive laws which appear almost undemocratic in so zealous a democracy, the rights of the absent law-breaker would seem to be guaranteed, as the person who is absent through other than his own fault may demand a new procedure in any case.

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The Fascist legislation seems almost as hard in the prescription regarding the giudizio in contumacia. Whereas the former Italian criminal codes, namely those of 1865 and 1911, always permitted the annulment of a sentence in absentia on the appearance of the defendant, the Fascist law of 1930 limited the possibility of the annulment of the sentence and of a new procedure to such an extent, that only an appeal was possible, with a remand to begin on the day of the sentence against the defendant.
So that even this code, which is considered in legal history as a very strict one, guaranteed the defendant the possibility of a revision of his sentence.

The German law, that is both the criminal code of 1 February 1877 as well as the supplementary law of 28 June 1935 includes proceedings against absentees. While the older law allowed for procedure in absentia only in lighter cases, the supplementary law of 1935 of National-Socialist Germany established a procedure in absentia for every case demanded by the prosecution thus fulfilling the inborn principle of omnipotence/present in every modern state whether democratic or autocratic. But it was just the supplementary law of 1935

which prescribed a revision of the proceedings after the appearance of the absent defendant, and that not only from a feeling of duty, when the absence is excusable, but also from conviction when the renewal of the main proceedings seems necessary to the court.

Such are the legal attitude and legal theories in civilized states. It follows, therefore, that the stipulations in Article 26 of the Charter, according to which a sentence in absentia becomes definite and unassailable, represent an unheard of novelty in the whole legal history of European and American cultured circles. It is thereby clear that no consideration has been taken of that principle of justice, which was firmly established by the Romans, that the defendant must be provided with a lawful examination even in the event of his absence.

Gentlemen of the High Tribunal!

I cannot and will not criticize the Charter. I wish merely to establish the fact that the Charter has created an unheard of novelty. I am, however, of the modest opinion that, in view of this specific novelty in the legal history of all times and countries, the High Tribunal should carefully consider whether at the present stage of the proceedings it will enforce the right, granted by Art.12 of the Charter, to prosecute in absentia.

Since a revision of the sentence is no longer possible, the proceedings in my opinion should be carried out only

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if by a corresponding application of the fine and clear principles of Russian law it is first proved that the defendant Martin BORMANN is wilfully evading the court and secondly that the circumstances are not in any respect subject to the slightest doubt. As the Charter does not stipulate more clearly when and under what conditions the Tribunal is to enforce its right, the latter must make a law for itself.

Owing to the incontestable nature of the sentence, the Tribunal's responsibility in this particular case is a heavy one. My opinion that the sentence is final, is also shared by the high Tribunal, as in the last phrase of the public charge against the defendant BORMANN it is stated explicitly, that should the defendant be found guilty, the sentence will be applied without any further procedure as soon as he is apprehended.

But in my opinion it has not been proved at all that the defendant is wilfully keeping away from justice. I think that as revealed by the examination of the witness Kempka it is even highly probable that the defendant BORMANN is already dead.

Witness Kempka has stated that, on the night of 1st to 2nd May 1945, together with State Secretary Naumann as first, the defendant BORMANN as second, the Standartenführer Dr. Stumpfecker as third, and himself as the fourth in that order, he

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had tried to flee through the Russian lines by keeping close to the left hand side of an advancing tank. Borman was walking close to the middle of the tank, so the witness had the impression that Bormann's hand was holding on to the tank. That action seemed to the witness necessary in order to keep pace with the rolling tank. That tank, having passed anti-tank obstacles and having advanced some 30-40 meters beyond was blown up into the air, presumably by a direct hit of an anti-tank grenade (Panzerfaust).

The witness observed without any possible doubt that in the immediate vicinity of the tank just where Bormann walked a darting flame burst forth from the exploding tank, knocking down Bormann and State Secretary Naumann walking immediately ahead of him. Thus Bormann found himself in the centre of the explosion which was so violent that the witness is convinced Bormann must have died under such circumstances without a doubt. It cannot be maintained that owing to the fact that the witness had escaped the violence of the explosion Bormann also must have been saved. It should be noted that Kempka was running behind of the tank on the left hand side and thus was at a distance of some 4 meters from the explosion proper. Furthermore, he had additional protection in the person of Dr. Stumpfecker, running in front of him, whose body was thrown against him by the explosion, serving as cover. Kempka has testified that Bormann was wearing the uniform and the rank insignia of an SS-Obergruppenfuehrer at that time.

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Even if Bormann had not been killed on this occasion he would certainly have been wounded so seriously that it would have been impossible for him to escape. Unquestionably he would have fallen into the hands of the USSR troops who according to the affidavit of the witness KNUEGER had already been quite close to the Reich Chancellery and had occupied it already on 2 May 1945 owing to the fact that the defenders had fled. With the loyalty the USSR is showing in these proceedings she would have transferred BORMANN to the High Tribunal for trial.

There being only two possibilities, - at least in my opinion - the first of which, namely that the wounded Bormann fell into the hands of the USSR, has been proved not to be true, then only the second possibility can have happened, namely that BORMANN lost his life.

I am therefore of the opinion that I have proved with sufficient likelihood that BORMANN is dead.

In my opinion one should not be allowed to say that until death is established with absolute certainty a man is to be supposed alive. This is a supposition which I, the defense counsel, would have to refute.

A legal assumption of a person being alive has existed in all countries of the world but only in the field of private law, and only for the purpose of regulating conditions pertaining to inheritance or matrimonial property laws. However, a legal assumption of a person being alive has only very seldom been stipulated, e.g. in Common Law and in the Prussian Law and even there it is contested.

The Civil Code knows of no assumption of a person being alive but instead only admits the declaration that a person is missing in the eyes of the law. Common Law neither provides a declaration as to the death of a person nor a special one as to a person being alive. Russian law permits already after a short period of time a declaration as to a person being missing in the eyes of the law, and this may be followed by the declaration of the person's death. But even in these stipulations no assumption can be found as to the person being alive.

Whatever is the case in the field of civil law, it is nevertheless a fact that in the field of criminal law there exists no assumption as to a person being alive, in any country. If, however, driminal law does not recognize such an assumption as to a person being alive, it is not my duty either to refute such an assumption as to a person being alive. It must be enough when such circumstances are proved by the defense as lead one through a reasonable evaluation of the usual course of life, -as I have already shown, -to conclude that a defendant is dead.

I am, therefore, of the opinion first of all that the death of the defendant BORMANN was proved with sufficient probability, in fact with such great probability that the proceedings would accordingly have to be suspended entirely and for ever since the charter does not recognize a trial of dead persons. It there were such a thing as the trial of a culprit after his death the prosecution, according to all logic and reason, would have had to indict the real heads of National-Socialism.

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But apart from all this, it is not at all proved in my opinion that the defendant BORMANN is intentionally evading the trial as long as the possibility exists that the defendant is dead. It is correct that the Charter does not recognize such an assumption for the procedure against a defendant who cannot be found. However, the Charter is rather taciturn on this subject and I have already stated that I am convinced the High Tribunal should, examine very carefully whether it should exercise its right in this special case of the defendant BORMANN. Considering the finality of the verdict it seems to me fair and just in the case of BORMANN to consider at least the general legal principle of all civilized countries by which a defendant must be guaranteed a hearing even if only after his arrest. Thus by suspending the proceedings one would avoid creating accomplished facts as long as it is still possible that BORMANN's absence can be excused.

May I point out in this respect that paragraph 12 of the Charter, second section, expressly refers the Tribunal to the interests of justice which it should consider in examining the question whether it intends to try in absentia cases other than where the defendant cannot be found. These interests of justice are not unilateral and are not directed against the defendant exclusively. True justice is always universal. In all laws of the world it demands that as far as possible in the eyes of justice the interests of the defendant shall be protected as well.

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In the case of the defendant KRUPP's illness, the Tribunal already exercised its right not to try a person in absentia. Even if this case cannot quite be compared with that of the defendant BORMANN the decision should be considered in the present instance, too.

Just because of the peculiar character of the case and in view of the testimony of the witness KEMKA, one can by no means consider the fact as proved that the defendant BORMANN deliberately stays away from the Tribunal, because however the matter is viewed, one cannot ignore the possibility that - even if he had been saved and had not fallen into the hands of the Allies - he may have been injured permanently and to such a degree that neither physically nor mentally he is in a position to surrender to the Tribunal It is for this very reason that after thorough consideration I believe that in the interests of true justice the Tribunal should suspend proceedings against the defendant BORMANN.

Such a decision, however, is also justified according to the second principle which was formulated by the Russian law, namely that proceedings shall as a rule be permitted only if the circumstances of the case are no longer subject to any doubts.

The defendant BORMANN is absent. He has not even been able to defend himself against the charges made against him. He has not been able to give me any information and I have not been able to find any witnesses

who would have sufficient knowledge of the matter and who would be able to disclose to me any exonerating evidence concerning the accusations made.

Now as ever in the course of these long proceedings BORMANN's person and activity remained in that obscurity in which owing to his character the defendant already kept himself during his lifetime. The charges which many co-defendants have made against him, perhaps for very special reasons, and obviously in order to further their own defense and exonerate themselves cannot for reasons of fairness be taken as the basis of a judicial decision. The prosecution has already stated quite frequently through its representatives that the defendants would endeavour to throw the main blame upon dead or absent men for the acts which are subject to the Tribunal's jurisdiction. Some of my colleagues have followed these tactics of the defendants in their defense speeches. Perhaps it was right to do all this. I cannot judge the matter. Besides, I have no authority to form such a judgment.

But nobody knows what the defendant BORMANN could have answered these men if he had been present. Perhaps he would have been able to show that his entire activity was not the cause for the happenings which the indictment deals with, furthermore, that he did not have the influence which is imputed to him as the secretary of the Fuehrer and the Party.

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It is known all over the world, that to secretaries and chiefs of central chancelleries, just like to the princely valets in the times of absolutism, has always been ascribed considerable influe upon their superiors, as it is in the nature of things that throu the hands of such secretary must pass everything which can only be handled officially. But what in a modern State can evade the Moloch of bureaucracy?

The Document Book and the Trial Brief, presented by the prosecution do in no case contain a definite indication, that in the incriminating events and measures BORMANN personally had effective and outstanding influence on the actions and measures of the third Reich, of the NSDAP, and even of Hitler himself and of how strong that influence had become.

In the comments to the decree of BORMANN, printed in Volume II of the official compilation "Instructions, Directives and Announcements of the Party Chancellery", page 228, presented as BORMANN Exhibit No.11 in my book of documents, it is stated that the party chancellery was an agency of Hitler, which he used to direct the party. Expressly emphasized is the fact that since 12 May 1941 Hitler had again taken over the full and exclusive direction of the party. The head of the party chancellery, at tha time BORMANN, had been charged

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to inform Hitler continually about the work situation at that time in the party and to let him know of all circumstances which were important for the taking of decisions in party affairs. This had to be done according to HITLER's fundamental directives, and the determination of the latter, especially as regards their political aspect, the supreme chief of the party had reserved for himself.

Thus it is shown that the party chancellery was the central chancellery for matters concerning the home policy of the Reich leadership, and through this channel were sent up to Hitler all suggestions and information coming from below, whilst directives coming from HITLER were passed down by it to the lower levels.

It is right to say, that a man in such a position can have a great influence, if there is a man who can be easily influenced at the top; but it isalso correct to say, that a man in such a chancellery can play a purely formal role as the head of a liaison agency if at the top there is a dictatorial autocrat who cannot be influenced and if the chief of the chancellery has no special ambition nor any special abilities.

The proceedings which have been held for many months under this roof have shown which one of the two alternatives is more likely. It is obvious that seen from lower levels the head of the chancellery would appear influential, even in the case of the second alternative, because everything went through his hands, and because any blame for subordinates passed through this agency, and

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because all mastakes, which arose in the country with the other officials, were reported there. These officials and subordinates, however high a rank they may have held, and even though in part they may have feared the chief of the party chancellery, -perhaps indeed only for reasons due to their personality or mistakes,- these are not the right people to enlighten us as to which of the two alternatives described is the proper one. As long as BORMANN does not appear and is not heard personally, the true part he played remains obscure. Nobody, even the High Tribunal, could eve pass a reliable sentence. The whole case remains dubious.

It remains dubious even in the individual points. I would like to demonstrate this by just a few examples.

My esteemed colleague of the defense, Dr.THOMA, has stated that BORMANN prevented the defendant ROSENBERG from following his policy. For this he referred to the memorandum of DR.MARKULLS, submitted as R-36. But this document is nothing other than a comment on an unknown, unproduced BORMANN DOCUMENT.

MARKULLS declares expressis verbis, that he translated BORMANN's formulations into the language of a simple member of the German civil service, and presented them more pointedly. So, only BORMANN could enlighten us in this case, and tell us whether he wished his writing to be understood in this way, or whether MARKULLS twisted the meaning and sense of BORMANN's writing,

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so that only BORMANN could disclose, whether this writing, like almost all the BORMANN DOCUMENTS submitted, did not simply transmit the utterance of a Reich leader or of HITLER. So this case, too, seems altogether doubtful. An explanation can hardly be expected. Furthermore, it must be pointed out, that almost all the documents which the prosecution has gathered together in its document-book, are in general mere reproductions and publications of a HITLER DECREE or a HITLER INSTRUCTION. BORMANN transmitted these instructions to the subordinate agencies with an accompanying letter, in order to inform the agencies concerned. This is an activity which like office work has to be done, even in the most terrible tyranny and in the most reprehensible despotism, - how much more so in a modern state structure like the National-Socialist Reich. Some man has to forward all the instructions and orders to the subordinate agencies, that is a purely formal activity. It could be done as well by a plain office boy as by a brilliant Reich-leader.

From the transmission of such instructions, according to office routine - I mention for example the documents 069-PS, 1950-PS, 656-PS, 058-PS, 205-PS, and even the famous document 057-PS can only be considered as a transmission of a HITLER directive and opinion - , from such a method of transmission nobody can draw the conclusion,

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that the forwarding party had an influence on the decrees, orders and decisions. It is possible, but its certainty has not been proved.

But before a sentence is passed, this question of influence should be entirely clarified. Because if in the transmission of an order, according to chancellery routine, one could see any offense, -whereby one would even come to condemn the women who wrote such orders on the typewriter- the verdict of justice must judge differentl the importance and severity of the punishment for such clerical work on orders, from that which should fall upon a man whose collaboration was a decisive factor in causing such orders and decisions, and who, by his influence and advice, led the chief of state to deliver them. All this is not clear in BORMANN's case, and remains dubious. The empty word of the co-defendants, whose motives can never be entirely unveiled, saying that BORMANN exercised great, even diabolic influenc is no proof.

The other documents of the prosecution only prove, that BORMANN, according to the decree of 29 May 1941, 2099-PS, and to the decree of 24 January 1942, 2100-PS, arranged for an exchange of correspondence between the individual Reichsleiters and forwarded their desires and suggestions. As an example I mention documents 056-PS, 072-PS, 061-PS 656-PS. Nobody can derive with certainty from these activities as a go-between, which were necessary from the standpoint of administrativ work, the extent and true nature of BORMANN's influence.

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Further documents show that BORMANN very often served as a mere stenographer, and took the necessary notes during HITLER's discussions with some of the defendants. This is proved by document L-221 concerning the annexation of the "Eastern Territories" (Ostraumannektion) and the Russian document USSR-172. But in any case such documents do not make clear whether and how he influenced in such sessions the policy and the measures of the Third Reich. According to all rules, a stenographer has no influence at all. He only fulfills an automatic activity.

I would not like to be misunderstood in this. Far be it from me to dispute the fact that BORMANN occupied quite an important position in the leadership of the Third Reich. But no clear view has emerged during this trial as to the real weight BORMANN could throw into the scales or to what extent his importance was increased and inflated by the bad conscience of third parties, and finally of what his influence actually consisted. Statements of the other defendants, which were made for their own defense, do not constitute relevant evidence. At any rate, the document-book of the prosecution contains almost exclusively documents like those I have just examined closely.

Accurately speaking , BORMANN only did what was legal in Germany. This is revealed in the documents I submitted, e.g. BORMANN-Exhibit Nos. 2,3,5,7, in which

he repeatedly pointed out to party offices, that any illegal action against Jews was not permitted.

It is characteristic for Bormann's case that not even measures against Jews could be proved against him. He never did more than forward such instructions and bring them to notice or publish them, as it was prescribed by the law and as followed from his clerical position as party secretary. Even the great conference of 12 November 1938, which was held under the chairmanship of Mr. Goering and from which emanated a series of laws against the Jews, is only connected with Bormann's personality insofar as Bormann forwarded to Mr. Goering Hitler's instruction ordering that such a conference be held. In any case it has not been made clear at all what influence Bormann himself had on these questions. But how can a just Tribunal determine the extent of an appropriate punishment, if the part played, if the participation of the individual defendant in the offense is not clearly established? Nobody can say that there is no doubt about the circumstances of the case.

With respect to the first idea, it seems to be most certainly proved by the Document Book of the prosecution that Bormann was one of the most zealous in the fight against Christian churches. Most of the documents quoted in the Trial Brief referred to this point. It is certainly correct to say that Bormann was philosophically and according to his attitude a violent opponent of the Christian doctrine. But, such a spiritual attitude in itself is neither an offense nor even a crime before the whole of mankind,

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which embraces so many different conceptions of the world and the higher connotations and will perhaps give birth to many more.

In modern times there are countless convinced atheists.

In other countries of the globe, too, there are officially recognized organizations which oppose the Christian interpretation of the world, and at the turn of our century there were big associations in many countries which had pure materialism as their philosophical system and the negation of spiritual things openly inscribed on their banner. No one can be punished for wishing to teach others the precepts of his ideology or for wanting to convert them to his point of view. The modern world still recalls the horrors of the Inquisition.

Therefore, Bormann could only be punished if it were proved that he participated in a real religious persecution and not merely in an ideological struggle.

In my opinion the two most important pieces of documentary evidence which the prosecution has produced against Bormann, namely documents L-75 and 089-PS, do not show that the defendant MARTIN BORMANN in his official position undertook anything against the churches as religious institutions.

The quintessence of document L-75 is contained in the sentence which says that

from the incompatibility between National-Socialist and Christian idéology it must be deduced that any strengthening of existing Christian confessions and any furtherance of new ones arising is to be rejected by the party. It is of no importance, for what urgent reasons BORMANN came to write such a sentence at the end of his letter. One need not discuss the fact that failure to strengthen a religious conception which one opposed on philosophical grounds does not constitute religious persecution. Nobody is obliged to support a religious conception. It is not permissible to direct one's attention only to excited arguments stating that a religion should not be strengthened and to disregard the conclusions from such considerations.

It is furthermore important in this connection that we received only one copy of this document, a copy which a Protestant minister by the name of Eichholz made out for himself. Whether the reproduction of the contents of BORMANN's statement in this document is fully correct, has not at all been proved. In any case the document in this form does not represent true evidence.

In document 089-PS, which may be recognized as being authentic, BORMANN takes indeed a very definite stand against the church. It finishes, however, - and this is the only fact which should be considered for the verdict - by saying that no National-Socialist teacher be reproached for teaching Christian religion and

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in such a case the original text of the Bible should be used;any new interpretation, comment or taking apart of the text of the Bible is to be avoided. Therefore,BORMANN, despite his previous philosophical attack against the church takes here the legal standpoint that the Christian dogma may be freely propagated. Could a more loyal action ever be expected of such a strong opponent of a doctrine ?

The remaining documentary evidence does not reveal any real persecution measures either. The fact that BORMANN on HITLER's order prohibited the admission of priests or of members of certain religious associations to the party andthat on HITLER's order he forbade priests to be appointed to leading positions in the party in order to prevent dissensions, is no religions persecution. The fact that during the war he demanded that the church make the same sacrifices as the other institutions of the State does not represent a criminal measure for religious reasons. That within the closing of many lay institutions which was to take place in order to make a better use of human reserves of the nation he strove for the closing of church institutions,too; that within the limitation of the number of copies and number of pages of lay publications he wished that church publications be limited also, does not come under the provisions of Article 6 (c) of the Charter.

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It is true that he let himself be guided in this respect among other things also by his anti-clerical attitude. But when otherwise the same measures were taken in Germany against other institutions and other publications, too, measures which as war measures were supposed to be only temporary, one cannot speak of an actual religious persecution. Not even Bormann's participation in orginating the persecution of priests has been submitted or proved at all.

It results from all documents that Bormann always adhered to the effective legal stipulations and that he, who was so eagerly intent on complying with Hitler's orders, certainly observed strictly Hitler's decree which directed at the beginning of the war that all measures against the church be discontinued.

Therefore, it may be said in conclusion that this matter, too, cannot be really cleared up despite the numerous documents presented. Documents alone do not suffice to dissipate all doubts on the case. Especially with respect to the importance and weight of Bormann's share in persecution measures against the church it seems necessary to determine Bormann's personal responsibility. Thus, this fact also remains somewhat obscure. A basis for a just determination of the amount of punishment cannot be established.

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I shall not take up the time of the High Tribunal by exhibiting further details. I think that the indications I have given are sufficient to show that even the documents presented by the prosecution prove in any case only one thing with certainty, namely that BORMANN in his capacity as chief of the Party Chancellery, held "as ordered by the law" an intermediary position in the clerical, secretarial dealings between the head of the Reich and the subordinate agencies and in the dealings among those subordinate agencies.

Anything else is only an assumption which has not been definitely proved, in any case not with that certainty which must seem essential for the sake of justice in order to pass a verdict in absentia and without hearing the defendant, especially with respect to the severity of the punishment. Unfortunately, a legend has been woven around BORMANN's personality, his activity and his survival. But for the sober judgment of jurists, legends are not a valid basis for a sure verdict free from any doubt.

In view of the innovation created by the Charter in the history of law of all times and all nations in passing a final, irreversible sentence upon an absent defendant, I beg the High Tribunal to make use of its right to carry through such a procedure only after having considered the hitherto existing legal conceptions and especially when examining the case to consider the prerequisites set down in a particularly precise manner by the Russian law.

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I,therefore,expressly propose that the Tribunal decide to suspend the proceedings against the defendant BORMANN until he is personally heard and can personally state his case, and that the Tribunal make no use of its right according to article 12.

(signed) Dr. Friedrich Bergold.

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